JASA KERAMAT SDN BHD & ANOR

v.

MONATECH (M) SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: B-02-714-1998]
24 JULY 1999

CIVIL PROCEDURE: *Striking out - Abuse of process - Change of forum - Action in High Court at Shah Alam to nullify orders granted by High Court at Penang in pending matters - Whether procedurally improper - Whether using interlocutory relief as an instrument of oppression - Whether an abuse of process - Arbitration Act 1952, s. 24(1) - Courts of Judicature Act 1964, s. 20 - Rules of the High Court 1980, O. 69 r. 2(1)(b)*

The parties herein had referred their contractual disputes to an arbitrator. In June 1998, by an originating summons filed in the High Court at Penang ('the first action'), the first appellant obtained: (i) an *ex parte* injunction freezing the retention sum of RM575,000 held by the respondent under the contract; and subsequently (ii) a consent order that the said sum be held in the joint account of the parties' solicitors. At about the same time, the respondent applied for and obtained, from the same court ('the second action'), an *ex parte* injunction restraining the arbitrator from proceeding with the arbitration. In August 1998, while the first and second actions were pending before the High Court at Penang, the respondent, for reasons unclear, filed an action in the High Court at Shah Alam ('the third action') and obtained: (i) an *ex parte* injunction restraining all proceedings in the first and second actions; and (ii) an order that the sum of RM575,000 held in the joint account of the solicitors be paid out to the respondent. The appellants alleged that the respondent, in commencing the third action, had abused the court's process, and in the circumstances applied to the learned judge at Shah Alam to have the third action struck out. The applications were dismissed whereupon the appellants appealed.

Held:
Per Gopal Sri Ram JCA

[1] It is plainly an abuse of the court's process where relief at law or in equity is used, not to remedy a genuine grievance, but as an instrument of oppression.

[2] There is no good reason for the respondent to have approached the High Court at Shah Alam by way of the third action. The manner in which the approach was made smacks of an abuse. The respondent had abused the process of the court not only in instituting the third action but in the steps it took therein

[2a] The third action, if at all necessary, ought to have been instituted in the High Court at Penang as that would be the convenient forum. The learned judge in the Court at Shah Alam, by reason of history of the prior litigation between the parties, should not have entertained the third action. The learned judge should instead have referred the matter to the Chief Judge of Malaya for the latter's discretions under s. 20 of the Courts of Judicature Act 1964, on the transfer of the third action to Penang.

[3] The orders in the third action, which had the effect of staying the first and second actions in the hands of the Penang High Court, is a clear instrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch. The orders have interfered with the power and jurisdiction of the High Court at Penang, particularly so in respect of the order that directs the payment out of monies in violation of the consent order in the first action.

[4] By obtaining an *ex parte* injunction in the third action after having obtained an order against the arbitrator in the second action before the High Court at Penang, the respondent had bound the appellants hand and foot and had truncated the arbitration proceedings. The conduct of the respondent was entirely unconscionable in all the circumstances of the case. There can hardly be a clearer case where injunctive relief has been used as an instrument of oppression.

[4a] By obtaining the further *ex parte* order in the third action, the respondent had nullified the consent order in the first action that the retention monies should be placed in a joint account. Thus, the respondent had bypassed the need for an *inter partes* application in the first action to have the consent order vacated. Had such an application been made, the respondent, having entered into the consent order with open eyes, would have found it most difficult to surmount the obstacles that lay in its path in having that order set aside.

[5] If the respondent was genuinely unhappy with the conduct of the arbitrator, it could have pursued the remedy of removing the arbitrator pursuant to s. 24(1) of the Arbitration Act 1952. The procedure by which the High Court is to be moved for such relief is prescribed by O. 69 r. 2(1)(b) Rules of the High Court 1980. By commencing the third action, the respondent had bypassed the procedure established by law.

[6] The learned judge at Shah Alam High Court, in granting the orders in the third action, and holding that there were serious questions to be tried such as to render the summary procedure inappropriate, had taken a rather simplistic approach and had overlooked considerations that were materially relevant to the jurisdiction that he was invited to exercise. This is a case where the learned judge had failed to exercise his discretion in accordance with law thereby warranting appellate interference.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pihak-pihak di sini telah merujuk pertikaian kontraktual mereka kepada seorang penimbangtara. Pada bulan Jun 1998, melalui suatu saman pemula yang difailkan di Mahkamah Tinggi Pulau Pinang ('tindakan pertama'), perayu pertama memperoleh: (i) satu injunksi *ex parte* bagi membekukan wang cagaran berjumlah RM575,000 yang dipegang responden di bawah kontrak; dan seterusnya (ii) satu perintah persetujuan bahawa jumlah wang tersebut dipegang oleh peguamcara-peguamcara mereka melalui akaun bersama. Pada lebih kurang masa yang sama, responden telah memohon dan memperoleh, dari mahkamah yang sama ('tindakan kedua'), satu injunksi *ex parte* menghalang penimbangtara dari meneruskan timbangtara. Pada bulan Ogos 1998, ketika tindakan pertama dan kedua masih dikendalikan di Mahkamah Tinggi Pulau Pinang, responden, atas alasan yang kurang jelas, memfailkan tindakan di Mahkamah Tinggi Shah Alam ('tindakan ketiga') dan memperoleh: (i) satu injunksi *ex parte* menghalang semua prosiding dalam tindakan pertama dan kedua; dan (ii) satu perintah bahawa wang berjumlah RM575,000 yang dipegang di bawah akaun bersama peguamcara-peguamcara dikeluarkan dan dibayar kepada responden. Perayu-perayu mengatakan bahawa responden, dalam memfail tindakan ketiga, telah menyalahguna proses mahkamah, dan dengan itu memohon kepada hakim bijaksana di Shah Alam untuk membatalkan tindakan ketiga. Permohonan tersebut ditolak dan perayu-perayu merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ianya jelas satu penyalahgunaan proses mahkamah bila relif di sisi undang-undang atau ekuiti digunakan, bukan untuk menyembuh suatu ketidakpuasan yang tulen, tetapi sebagai satu alat untuk menindas.

[2] Tiada alasan kuat bagi responden untuk ke Mahkamah Tinggi Shah Alam bagi memfailkan tindakan ketiga. Cara pendekatan tersebut dibuat berbau satu penyalahgunaan. Responden telah menyalahguna proses mahkamah bukan sahaja dalam memulakan tindakan ketiga tetapi juga dalam langkah-langkah yang diambil di dalamnya.

[2a] Tindakan ketiga, jikapun perlu, seharusnya difailkan di Mahkamah Tinggi Pulau Pinang kerana itulah forum yang sesuai. Bersebabkan sejarah litigasi terdahulu di antara pihak-pihak di sini, hakim bijaksana di Mahkamah di Shah Alam sepatutnya tidak melayan tindakan ketiga. Hakim bijaksana sebaliknya harus merujuk perkara tersebut kepada Hakim Besar Malaya bagi membolehkan Yang Amat Arif melaksanakn budibicaranya berhubung perpindahan tindakan ketiga ke Pulau Pinang di bawah s. 20 Akta Mahkamah Kehakiman 1964.

[3] Perintah-perintah di dalam tindakan ketiga, yang secara berkesannya menggantung tindakan pertama dan kedua yang dikendalikan oleh Mahkamah Tinggi Pulau Pinang, adalah satu campurtangan oleh satu cabang Mahkamah Tinggi ke dalam perjalanan prosiding yang jelas berada di bawah kawalan dan penyeliaan cabang yang lain. Perintah-perintah tersebut telah mengganggu kuasa dan bidangkuasa Mahkamah Tinggi Pulau Pinang, terutama sekali berhubung perintah yang mengarahkan pembayaran keluar wang yang jelas bercanggah dengan perintah persetujuan dalam tindakan pertama.

[4] Dengan memperoleh injunksi *ex parte* di dalam tindakan ketiga selepas memperoleh perintah terhadap penimbangtara di dalam tindakan kedua di Mahkamah Tinggi Pulau Pinang, responden telah mengikat kaki dan tangan perayu dan telah menjejaskan prosiding timbangtara. Kelakuan responden adalah sangat tidak patut dalam keseluruhan halkeadaan. Sukar untuk membayangkan kes yang lebih jelas di mana relif injunktif dipergunakan sebagai satu alat untuk menindas.

[4a] Dengan memperoleh perintah lanjut *ex parte* di dalam tindakan ketiga, responden telah membatalkan perintah persetujuan di dalam tindakan pertama bahawa wang cagaran harus diletakkan di dalam akaun bersama. Dengan cara itu, responden telah mengelak dari keperluan untuk memohon pembatalan perintah persetujuan tersebut secara inter partes

di dalam tindakan pertama. Sekiranya permohonan *inter partes* sedemikian dibuat, responden, setelah memeterai perintah persetujuan dengan mata yang terbuka, tentulah mendapatinya sukar untuk melepasi halangan-halangan yang berada di hadapannya bagi mengetepikan perintah tersebut.

[5] Sekiranya responden benar-benar kurang senang dengan penimbangtara, ia boleh mendapatkan remedi pengusiran penimbangtara melalui s. 24(1) Akta Timbangtara 1952. Prosedur di mana Mahkamah Tinggi harus digerakkan untuk relif sedemikian ada diperuntukkan di bawah A. 69 k. 2(1)(b) Kaedah-kaedah Mahkamah Tinggi 1980. Dengan memulakan tindakan ketiga, responden gagal menggunapakai prosedur yang diperuntukkan oleh undang-undang.

[6] Hakim bijaksana di Shah Alam, dalam membenarkan perintah-perintah di dalam tindakan ketiga, dan mendapati bahawa terdapat isu serius untuk dibicarakan yang menyebabkan prosedur 'summary' tidak sesuai, telah mengambil pendekatan yang agak 'simplistic' dan telah melupakan pertimbangan-pertimbangan yang secara materialnya relevan kepada bidangkuasa yang mana beliau diminta laksanakan. Ini adalah kes di mana hakim bijaksana gagal melaksanakan budibicaranya mengikut undang-undang yang mana memerlukan campurtangan di peringkat rayuan.

[Rayuan dibenarkan]

Case(s) referred to:

Bina Satu Sdn Bhd v. Tan Construction [1988] 2 CLJ 652 ***(refd)***
Castanho v. Brown & Root (UK) Ltd & Anor [1981] AC 557 ***(refd)***
Chee Kuan Cheng v. Chou Kong Kah [1967] 2 MLJ 74 ***(refd)***
Gilham v. Browning & Anor [1998] 2 All ER 68 ***(refd)***
Grovit & Ors v. Doctor & Ors [1997] 2 All ER 417
Keet Gerald v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 ***(refd)***
Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd [1996] 3 CLJ 483 ***(foll)***
Overseas Union Finance Ltd v. Lim Joo Chong [1971] 2 MLJ 124 ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 ***(foll)***

Legislation referred to:

Arbitration Act 1952, s. 24(1)
Courts of Judicature Act 1964, s. 20
Rules of the High Court 1980, O. 69 r. 2(1)(b)

Specific Relief Act 1950, s. 54

For the appellants - RR Sethu (Lim Hock Siang with him); M/s Azman, Davidson & Co

For the respondent - Mahadevi Nadchatiram (Shanti Segaram with her); M/s Mahadevi Nadchatiram & Partners

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

Preliminary

This appeal is directed against the order of the High Court at Shah Alam dismissing the appellants' summons to strike out the respondent's suit on the ground that it was an abuse of the court's process. We heard the appeal on 3 May 1999, and, at the conclusion of arguments, allowed it.

When pronouncing the order of this Court I said that this was one of the worst cases of an abuse of the process I had ever come across. Having re-read the appeal record for the purpose of writing this judgment I have found nothing to alter that view.

Facts And Chronology

The respondent is a housing developer. On 1 June 1994, it entered into an agreement with the first appellant. It was an agreement in the form prescribed by the Architects Association of Malaysia. It is known to the profession as "the PAM form of contract". Under the agreement the first appellant was to carry out certain infrastructure work for the respondent at a project site in Kulim, Kedah.

The second appellant is a consultant engineer. He is the managing director of the first appellant. According to the respondent's amended statement of claim, he is the alter ego of the first appellant.

Later, disputes arose over certain payments which the first appellant claimed was due to it from the respondent. The agreement which the parties had entered into carried in it an arbitration clause. It is a clause commonly found in the PAM form of contract. Acting in accordance with that clause, the parties, on 9 October 1997, referred their disputes to an arbitrator. Pleadings were then exchanged. These comprised of the first appellant's points of claim, the respondent's points of defence and counterclaim as well as a reply from the first appellant.

On 1 June 1998, while the arbitration was on foot, the first appellant took out an originating summons before the High Court at Penang ("the first action") and obtained an *ex parte* Mareva injunction freezing the contractual retention sum in the hands of the respondent. The first appellant instituted the first action because an arbitrator does not have jurisdiction to grant injunctive relief.

On 24 June 1998, the parties appeared before the arbitrator. The respondent objected to the arbitrator conducting the arbitration on the ground of bias. The objection having failed, the respondent, on 7 July 1998, took out an originating summons ("the second action") in which it obtained an *ex parte* injunction restraining the arbitrator from proceeding with the arbitration. The second action was also filed in the Penang High Court.

At the hearing of the first action on 20 July 1998 counsel for both sides appeared and obtained a consent order under the terms of which the respondent was to pay the retention sum amounting to RM575,000 into an account in the joint names of the parties' respective solicitors. This sum was to be held by the solicitors pending the resolution of the disputes between the parties either through arbitration or litigation.

On 27 August 1998, the respondent caused to be issued a writ and statement of claim (later amended) against the appellants. This suit, which I will refer to as "the third action", forms the subject matter of the present appeal. There is one matter in regard to the third action which, I think, calls for comment. It has to do with the venue selected by the respondent for commencing it.

Despite the fact that the first and second actions were already pending before the High Court in Penang, the third action was filed in the High Court at Shah Alam. Why this change of venue was necessitated is not altogether clear. Counsel for the respondent informed us during argument that Shah Alam was chosen because the respondent's address for service is in the State of Selangor. But I find this explanation unconvincing. The fact that its address for service is in Selangor did not prevent the respondent from initiating the second action in Penang. In my view, if the third action was necessary at all; and I use the expression "if necessary" advisedly; it ought to have been instituted in the branch of the High Court in Malaya at Penang as that would have been the convenient forum. After all, the branch of the High Court in that State was already seised of the first and second actions and would therefore have been in a far better position to deal with the third action as it was already advised of the nature of the dispute between the parties. In my judgment, the learned judge in the court at Shah Alam, by reason of history of the prior litigation between the parties before it, ought not to have entertained the third action. Instead, he ought to have referred the matter to the Honourable, the Chief judge of Malaya for the latter's directions under s. 20 of the Courts of Judicature Act 1964, on the transfer of the third action to Penang.

Returning now to the factual narrative, on the very day the writ was issued, that is to say, 27 August 1998, the respondent took out a summons for interlocutory relief. I will, in a moment, mention the nature of the relief sought by the respondent. But I must make some observations about the summons itself.

The respondent's application was not marked as an *ex parte* summons. In fact it was, on its face, made returnable *inter partes* before the judge in chambers on 4 September 1998. However, for some inexplicable reason, it was heard *ex parte* on 27 August 1998.

The interlocutory relief granted *ex parte* by the learned judge on the respondent's summons include an injunction restraining all proceedings in the first and second actions and an order directing that the sum of RM575,000 held in the joint account pursuant to the consent order made in the first action be forthwith paid out to the respondent upon service of the *ex parte* order.

Later, the appellants then took out two summonses to have the third action struck out as an abuse of process. These applications were heard and dismissed by the learned judge.

So much for the factual background.

The Law

It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion. (See, *Grovit & Ors v. Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become dominis litis, thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed. (See, *Overseas Union Finance Ltd. v. Lim Joo Chong* [1971] 2 MLJ 124; *Castanho v. Brown & Root (UK) Ltd. & Anor* [1981] AC 557.)

A fairly recent decision on the point is that of the English Court of Appeal in *Gilham v. Browning & Anor* [1998] 2 All ER 68. It was a case where the defendant's discontinuance of his counterclaim before the County Court was held to be an abuse of process. It was there held that whether in a particular case there was an abuse would be a question of fact and degree.

Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

This court dealt with the point fairly recently in the context of the tort of abuse of process. It was in *Malaysia Building Society Bhd. v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425. I there said (at p. 434):

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
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> The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p. 489 he said:
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> > In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.
>
> Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.
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> Sometime abuse can be shown by the very steps being taken in the courts. Take some instances from the law of libel. When a man sent a defamatory circular to seven different persons, and the party defamed brought seven different libel actions against the same defendant, one for each publication, all were stayed, save one, Erle J saying:

> [T]he plaintiff has not alleged that any purpose would be obtained by the course he has already adopted, beyond imposing the cost of litigation on the defendant.

See *Jones v. Pritchard* [1849] 6 Dow & L 529 at p. 530.

> Again, where a pamphlet contained two different passages, each defamatory of a man, he brought two separate actions, one for each passage. He failed on the first. The second was stayed, Fry LJ saying: 'Such successive actions ... would be an abuse of the process of the court ...'. See *Macdougall v. Knight* [1890] 25 QBD 1 at p. 10.

> At other times, the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law.

Abuse of process in the context of a step taken in the proceedings would, in my judgment, include the use of interlocutory relief as an instrument of oppression. The law provides for remedies, both interim and final, to a litigant to set right, or to prevent, some harm or injury that has been done or may be reasonably apprehended. It is plainly an abuse of the court's process where relief at law or in equity is used, not to remedy a genuine grievance, but as an instrument of oppression. There have been instances before our courts where an interlocutory injunction has been found to have been used as an instrument of oppression. We have always intervened in such cases and set the matter right. See, for example, *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v. Delcont (M) Sdn Bhd* [1996] 3 CLJ 483; [1996] 2 MLJ 605; *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 CLJ 552; [1997] 3 MLJ 165.

The Present Case

What remains is to apply the relevant principles to the facts of the present appeal. When that is done, I am driven to the conclusion that the respondent plainly abused the process of the court not only in instituting the third action but in the steps it took therein. There are several matters when taken together reasonably support that conclusion.

First, it is clear that if the respondent was genuinely unhappy with the conduct of the arbitrator, it could have pursued the remedy made available by s. 24(1) of the Arbitration Act 1952. That provision enables the High Court to remove an arbitrator who has misconducted himself. The proper procedure by which the High Court is to be moved for such relief is prescribed by RHC O. 69 r. 2(1)(b). The application should be by way of an originating motion supported

by an affidavit. The appellants would be entitled to appear and be heard upon such an application. Here, the respondent bypassed the procedure established by law by commencing the third action.

Second, the respondent having obtained an order before the High Court at Penang in the second action prohibiting the arbitrator from adjudicating upon the dispute in question, obtained a further *ex parte* injunction in the third action restraining all proceedings in the second action. This bound the appellants hand and foot. They found themselves in the unenviable position of being unable to apply for a discharge of the restraining order obtained by the respondent in the second action. The arbitration proceedings were truncated without a single shot being fired in reply. The conduct of the respondent was, to say the least, entirely unconscionable in all the circumstances of the case. In my view, there can hardly be a clearer case where injunctive relief has been used as an instrument of oppression.

Third, the respondent having entered into a consent order in the first action that the retention monies should be placed in a joint account, nullified that order with a stroke of a pen. This it did by obtaining the further *ex parte* order in the third action whereby the retention monies were to be released to it. By so doing, it bypassed the need for an *inter partes* application in the first action to have the consent order vacated. Had such an application been made, the appellants would most certainly have had an opportunity to appear and oppose it. And the respondent having entered into the consent order with open eyes, would have found it most difficult to surmount the obstacles that lay in its path in having that order set aside, especially since it was to the practical advantage to both parties. See, *Chee Kuan Cheng v. Chou Kong Kah* [1967] 2 MLJ 74.

Fourth, the respondent obtained orders in the third action that had the effect of staying the first and second action in the hands of the Penang High Court. This is a clear intrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch. I am conscious of the decisions at first instance in the cases of *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 and *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 2 CLJ 652; [1988] 1 MLJ 533. These two cases are authority for the proposition that s. 54 of the Specific Relief Act 1950 which, among other things, prohibits the grant of an injunction to stay proceedings in a court of co-ordinate jurisdiction, deals with only permanent not temporary injunctions and does not bar the grant of an injunction against a party to the action as opposed to one directed against the court. I am also aware that these decisions were affirmed for their correctness by this court in *Keet Gerald v. Mohd Noor bin Abdullah & Ors.* [1995] 1 CLJ 293; [1995] 1 MLJ 193. But I do not regard these cases as authorising

one branch of the High Court to interfere with proceedings properly seised by another branch. And I am unable to escape the conclusion in the present case that the orders granted in the third action, on their proper construction, in substance have the effect of interfering with the power and jurisdiction of the High Court at Penang. Particularly is this so in the case of the order that directs the payment out to the respondent of the retention monies in violation of the consent order in the first action. It is an order that is permanent and not merely temporary in effect.

Lastly, there is the matter of the change in the forum to which I have already adverted. There is no good reason for the respondent to have approached the High Court at Shah Alam by way of the third action. It was aware of the first and second actions that were pending before the Penang High Court. The manner in which the approach was made to the High Court at Shah Alam smacks of an abuse.

Most, if not all, of these arguments were presented to the learned judge by the appellants when they moved to strike out the third action. Unfortunately, the learned judge failed to properly appreciate the strength in the submissions made by the appellants to him. Instead, he took the rather simplistic approach by holding that there were serious questions to be tried and that the summary procedure was therefore not appropriate. In so holding he plainly overlooked considerations that were materially relevant to the jurisdiction that he was invited to exercise. In particular, he paid insufficient regard to the historical background of the matter (see, *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1) and the several other considerations hereinbefore adumbrated. This was accordingly a case where it was amply demonstrated that the learned judge had failed to exercise his discretion in accordance with law thereby warranting appellate interference.

The Result

For the reasons already given, the appeal was allowed. The third action was ordered to be struck out. All orders made therein were set aside. It was also ordered that the costs of the appeal and those in the court below be taxed on a solicitor client indemnity basis and that these be paid forthwith to the appellants. I realise that such an order for costs is not ordinarily made. It is usually reserved, in the discretion of this court, for the most exceptional of cases. Having regard to the conduct of the respondent, the present appeal is indeed such a case. The deposit lodged in court was ordered to be refunded to the appellants.

My learned sister Siti Norma Yaakob and my learned brother Mokhtar Sidin JJCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.